IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 4947 of 2005
With
CRIMINAL MISC.APPLICATION No. 7956 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

THE STATE OF GUJARAT - Applicant(s)

Versus

MAFATLAL KACHRABHAI RATHOD - Respondent(s)

==========

Appearance :
MR HM PRACHCHHAK APP for Applicant(s) : 1,
MR MM SHAIKH FOR MS RATNA VORA for opponent(s) : 1,
==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 21/09/2005

COMMON ORAL JUDGMENT

1. By filing these two petitions under Section 439 (2) of the Code of Criminal Procedure ('the Code' for short), the petitioner, State of Gujarat, seeks to challenge two separate orders one dated 5.3.2005 recorded in Criminal Misc. Application No.111 of 2005 and second one dated 6.7.2005 recorded in Criminal Misc. Application No.299 of 2005 by the learned Presiding Officer and Additional Sessions Judge, Fast Track Court, District Gandhinagar releasing the opponent/accused of both these petitions on regular bail in connection with the offence registered vide CR No.I-11/2005 at Sector 7 Police Station, Gandhinagar for commission of the alleged offences under sections 302, 504, 34 and 120-B of the IPC and also under section 135 of the Bombay Police Act on their executing a personal bond of Rs.25,000/- and furnishing solvent surety of the same amount on the terms and conditions mentioned therein.

2. From the averments made in the petitions as well as the FIR, the prosecution case is that both the opponents/accused were residing at the neighbourhood of deceased Ashokbhai Punjabhai Vaghela at Sector 3C, Gandhinagar. Since they were residing at the neighbourhood, very often disputes used to arise between them in respect of throwing waste in open plot No.601/2, which is situated between their houses. It is the prosecution case that by keeping grudge of the same, the opponents/accused, Harshadbhai Mafatbhai Rathod and his father Mafatbhai Kacharabhai Rathod hatched conspiracy on 21.1.2005 at 10.30 A.M. and opponent/accused Mafatbhai Kacharabhai Rathod started abusing Varshaben, wife of Ashokbhai, near the Plot No.601/2 of Sector 3C. On hearing the same, Ashokbhai asked Mafatbhai Kacharabhai Rathod not to abuse his wife Varshaben. Thereupon both the opponents/accused got angry with Ashokbhai and went back to their house and brought iron pipes

and both of them gave five blows with the iron pipes on the head of Ashokbhai and when Varshaben, wife of Ashokbhai intervened, both of them gave pipe blows on the head of Varshaben also and thereby caused grievous hurt to both the husband and wife. On receipt of fatal injuries, both of them succumbed to the same during the course of treatment. In connection with the said incident, FIR came to be registered at Sector 7 Police Station, Gandhinagar vide CR No.I-11/2005 for commission of the alleged offence under Sections 302, 504, 34 and 120-B of the IPC and also under section 135 of the Bombay Police Act. Thereafter investigation was put into motion. During the course of investigation, statements of witnesses were recorded and muddmal weapons were recovered by drawing discovery panchnama. The opponents/accused were arrested. Opinion of the FSL was also collected. Thereafter charge-sheet was filed.

3. The opponents/accused moved two separate applications before the learned Presiding Officer and Additional Sessions Judge, Fast Track Court, Gandhinagar, seeking their release on regular bail in connection with the FIR being CR No.I-11/2005 for the commission of the alleged offence under Sections 302, 504, 34 and 120-B of the IPC and also under section 135 of the Bombay Police Act. The learned Additional Sessions Judge after considering the submissions advanced by the learned advocates appearing for the parties and perusing the papers of the police investigation, recorded the finding that there is prima facie case against the opponents/accused for commission of the offence of murder. However, since there is only one eye witness who is the minor child of the victims and he has already been shifted to his grandfather's place at Kalol, there is no danger to his life. He therefore granted regular bail to the opponents/accused by passing two separate orders which has given rise to the

present petitions at the instance of the State of Gujarat.

4. Mr. HM Prachchhak, learned APP has contended that there is a prima facie case against both the opponents/accused for commission of the offence of murder of Ashokbhai and Varshaben and, therefore, it is a case of double murder. According to him, it is true that as per the persecution case there is only solitary eye witness i.e., minor child of the victims but that fact itself cannot be a ground to discard the prosecution case at pre-trial stage. According to him, there is no reason for the minor child of the victims to falsely involve the opponents/accused in the crime. It is also asserted by him that the learned trial Judge has recorded categorical finding that there is a prima facie case against both the opponents/accused for committing offence of double murder. However, he has released both the

opponents/accused on regular bail by assigning very irrelevant reason i.e., the minor child of the victims has been shifted to his grandfather's place and therefore there is no danger to his life. The learned trial Judge has ignored the basic fact that against both the opponents/accused there is a prima facie case for commission of the offence of murder and in the case of an offence of double murder, which is heinous and ghastly in nature, there was no earthly reason for the learned Additional Sessions Judge to grant regular bail to the opponents/accused. He therefore urged that the petitions deserve to be allowed and thereby both the orders passed by the learned Additional Sessions Judge whereby the opponents/accused are released on regular bail deserve to be quashed and set aside by cancelling the bail granted to them. He therefore urged that both the petitions deserve to be allowed.

5. In counter submission, Mr. MM Shaikh, learned advocate for Ms. Ratna Vora, learned advocate for the opponents/accused, has contended that the present petitions filed under Section 439 (2) of the Code are not maintainable as, according to him, the petitioners ought to have filed Criminal Revision Application under Section 397 of the Code and not Criminal Misc. Application No.439 (2) of the Code against the orders passed by the learned Additional Sessions Judge granting regular bail to the opponents/accused. According to him, the learned Additional Sessions Judge has very rightly exercised the discretion vested in him and after appreciating the police investigation papers granted regular bail to the opponents/accused which cannot be lightly interfered with in these petitions. According to him, it is settled principle of law that very cogent and overwhelming circumstances are required to be indicated for cancellation of the bail. In the instant case there are no such

circumstances. Further, according to him, the grounds that can be considered relevant for cancellation of bail are interference or attempt to interfere with due course of administration of justice or evasion or attempt to evade during the course of administration of justice or abuse of the concession granted to the accused in any manner. For this purpose, each case has to be judged on its own merits considering the factual aspects. The powers of cancellation of bail are to be exercised in exercise of judicial discretion and without arbitrariness.

6. In support of the aforesaid contention, Mr. Shaikh has relied upon the following judgments of the Apex Court as well as this Court:

i) Dolat Ram v. State of Haryana (1995) 1 SCC 349,

ii) Subhendu Mishra v. Sabrat Kumar Mishra and another, AIR 1999 SC 3026,

iii) Kamuben, w/o. Ramanlal Keshavlal v. Parmar Chamanbhai Narsinhbhai and others, 1997 Cri.L,R. (Gujarat) 75 and

iv) State of Gujarat v. Nilesh alias Munno Rasiklal Patel and others, 1997 Cri.L.R. (Gujarat) 63.

7. Besides this, on merits also it is contended by him that there is only a solitary eye witness, who is a minor boy of the victims, aged only nine years and therefore he is an interested and partisan witness and no credence can be given upon his police statement. Therefore, the learned Additional Sessions Judge has very rightly exercised discretion under section 439 (1) of the Code and released the opponents/accused on regular bail. He therefore urged that both the petitions may be rejected.

8. This court has considered the submissions advanced by Mr. Prachchhak, learned APP and Mr.

Shaikh, learned advocate for the opponents/accused, perused both the impugned orders passed by the learned Additional Sessions Judge by which the opponents/accused were released on regular bail and the papers of the police investigation supplied by Mr. Prachchhak during the course of his submission.

9. There is no dispute that one FIR came to be registered against the present opponents/accused at Sector 7 Police station, Gandhinagar vide CR No.I-11 of 2005 for commission of the alleged offences under sections 302, 504, 34 and 120-B of the IPC and also under section 135 of the Bombay Police Act on the accusation that on 21.1.2005 at 10.30 A.M,. both the opponents/accused hatched conspiracy and the opponent/accused Mafatbhai Kacharabhai Rathod started abusing Varshaben, wife of Ashokbhai near the Plot No.601/2 of Sector 3C with respect to throwing waste in open plot No.601/2 which is situated between the

houses of Ashokbhai and the opponents/accused. When Mafatbhai Kacharabhai Rathod started abusing Varshaben, Ashokbhai asked Mafatbhai not to abuse her. Thereupon both the accused got angry with Ashokbhai and went back to their house and brought iron pipes and both of them gave five blows on the head of Ashokbhai and when Varshaben, wife of Ashokbhai, intervened, both of them gave pipe blows on the head of Varshaben also and thereby caused grievous hurt to both of them. On receipt of fatal injuries, both of them succumbed to the same during the course of treatment.

10. On careful examination of the FIR as well as the police investigation papers, they reveal that “Kurul”, minor son of the victims, aged nine years, is an eye witness to the incident and he has given narration of the incident in detail and according to this court there is no reason for the minor boy of tender age to falsely implicate

the opponents/accused in the crime.

11. On examination of the post-mortem notes, it is seen that on receipt of the fatal blows both the victims succumbed to the injuries during the course of treatment. Narration in the FIR tallies with the injuries mentioned in the post mortem notes because as per post mortem notes also both the victims had received fatal blows on their head as well as other parts of body which is also described in the FIR. Besides this, during the course of investigation, weapons were also recovered from both the opponents/accused by drawing discovery panchnama at their instance. Therefore, this is a case of solitary eye witness coupled with the circumstantial evidence as the weapons were recovered by drawing discovery panchnama at the instance of both the opponents/accused. Therefore, from the evidence on record, prima facie, it appears that both the opponents/accused have committed heinous, ghastly

and gruesome murder of Ashokbhai and Varshaben, husband and wife.

12. The contention of Mr. Shaikh that these petitions filed under section 439 (2) of the Code are not maintainable as according to him the petitioner/ State of Gujarat ought to have filed Criminal Revision Applications under section 397 of the Code has no substance in view of the judgment of this Court in the case of Makwana Sambhubhai Chethabhai vs. State of Gujarat, 1992 (2) GLR 1291. In the said judgment, this Court has held that granting or refusing bail being interlocutory order, revision would not lie.

13. Applying the principle laid down by this Court in Makwana's case (supra) to the facts of the present case, it is obvious that the order of granting bail being an interlocutory order, revision certainly would not lie and, therefore, the petitioner – State of Gujarat has very

rightly filed Criminal Misc. Application under section 439 (2) of the Code seeking cancellation of bail granted to the respondents.

14. In the case of Chiman Lal v. State of U.P. and another, 2004 AIR SCW 4705 the Supreme Court has stated the factors to be considered for grant of bail. In the said case the Supreme Court has observed as under:

> *"Though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications. Yet a Court dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The Court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of*

course. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the Courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are: (1) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; (2) Reasonable apprehension of tempering of the witness or apprehension of threat to the complainant; (3) Prima facie satisfaction of the Court in support of the charge. Any order dehors of such reasons suffers from non-application of mind. Above being the position, the cryptic non-reasoned order of the High Court granting bail to the accused, is clearly indefensible."

15. In the case of Pandit Dnyanu Khot v. State of Maharashtra, 2002 (3) GLH 279, a Three Judge Bench of the Supreme court has held that the concept of setting aside unjustified, illegal or perverse order is different from concept of cancelling bail on the ground that accused misconducted himself or because of some new facts requiring such cancellation. It is also observed that if a person is illegally or erroneously released on bail under section 167 (2) of the Code, his bail can be cancelled by passing appropriate order under section 439 (2) of the Code.

16. In the case of Chandulal Harilal Lodhiya v. State of Gujarat, 1993 (1) GLR 596, this Court has held that bail granted by exercising discretion in favour of accused on totally irrelevant ground is liable to be cancelled by the High Court.

17. In the case of Puran v. Rambilas and others, 2001 AIR SCW 1935, the Supreme Court has held that the concept of setting aside of unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of the fact that some new facts have arisen requiring such cancellation. In paragraph 9 of the said judgment, the Supreme Court has further observed that generally speaking, the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. However, these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of the nature like bride burning and that too without

giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the Society. Therefore, an arbitrary and wrong exercise of discretion by the trial Court has to be corrected.

18. Applying the principles laid down by the Supreme Court as well as this Court in the above referred to judgments to the facts of the present case, there is no manner of doubt that the offence registered against the present opponents/accused is a very heinous and ghastly in nature as it is a case of murder of husband and wife and that too in a trifle quarrel that took place between the victims and the opponents/accused in respect of throwing waste in open plot between their houses.

19. In view of the discussion made hereinabove, I am of the opinion that the learned Additional Sessions Judge has committed grave error in granting bail to the opponents/accused totally on irrelevant consideration when there is ample evidence against the opponents/accused to show prima facie that both the opponents/accused have committed the murder of husband and wife. Therefore, according to this Court, the orders passed by the learned Additional Sessions Judge are erroneous in law and deserve to be corrected.

20. Seen in the above context, this Court is of the opinion that the learned Additional Sessions Judge has not properly exercised discretion vested in him for releasing the opponents/accused on regularly bail. Therefore, bail granted to both the opponents/accused deserves to be cancelled by allowing both these petitions.

21. For the foregoing reasons, both the petitions succeed and accordingly they are allowed. Both the impugned orders i.e., one order dated 5.3.2005 recorded in Criminal Misc. application No. 111 of 2005 and the second one dated 6.7.2005 recorded in Criminal Misc. application No.299 of 2005 by the learned Presiding Officer and Additional Sessions Judge, Fast Track Court, Gandhinagar releasing both the opponents/accused on regular bail are hereby quashed and set aside and accordingly regular bail granted to both of them is hereby cancelled.

22. At this stage, Mr. Shaikh, learned advocate for the opponents/accused, submits that the Sessions Case against both the opponents/accused is fixed for framing of charge on 28.9.2005 and therefore they would surrender before the learned Additional Sessions Judge, Gandhinagar on 28.9.2005. He therefore urged that time to surrender to both of them may be granted upto

28.9.2005.

The request made by Mr. Shaikh has not been opposed by Mr. Prchchhak, learned APP.

In view of the aforesaid state of affairs, request made by Mr. Shaikh is accepted. Both the opponents/accused are hereby directed to surrender before the learned Additional Sessions Judge, Gandhinagar on 28.9.2005 without fail who will send them to judicial custody. If they fail to surrender before the learned Additional Sessions Judge, Gandhinagar on 28.9.2005, the learned Additional Sessions Judge, Gandhinagar shall issue non-bailable warrant against both the opponents/accused to take them into judicial custody.

23. Before parting, be it stated that none of the observations made by the learned Presiding Officer and Additional Sessions Judge, Fast Track

Court, Gandhinagar while releasing the opponents/accused on regular bail and also by this Court while allowing these petitions by which the bail granted to them has been cancelled, shall not be considered as an expression of opinion on merits or demerits of the case and the learned Additional Sessions Judge before whom the Sessions Case comes up for trial shall decide the same strictly in accordance with law on the basis of the evidence that may be adduced and produced before him without being in any way influenced by the observations made by the learned Additional Sessions Judge or by this Court.

24. Rule is made absolute accordingly.

(A.M. Kapadia, J.)

...

(karan)